U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 October 2004

BALCA Case No.: 2003-INA-301
ETA Case No.: P2003-NY-02491038

In the Matter of:

ELLEN KESTENBAUM,
Employer,

on behalf of

BARBARA LEPICKA,
Alien.

Certifying Officer: Delores Dehaan
New York, New York

Appearance: Ewa Bogdan, Esquire
Bay Shore, New York
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by Ellen Kestenbaum ("the Employer") on behalf of Barbara Lepicka ("the Alien") for the position of Cook (Household) Live-Out. (AF 28-31).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On April 27, 2001 the Employer filed an application for alien employment certification on behalf of the Alien for the position of "Cook Jewish Kosher Specialty, Domestic," which has been classified as Cook (Household) Live-Out. (AF 28-31). The minimum job requirements included two years of experience in the job offered. (AF 31). The job duties listed in Box 13 on the ETA 750A included "[p]lans, prepares, seasons, cooks [J]ewish kosher dishes, such as…" and went on to list several specific dishes. *Id.*

On March 20, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis that the requirement of two years of specialized experience in kosher-style cooking is unduly restrictive. (AF 34-36). The CO explained that requiring an applicant to have experience in a particular type of ethnic or religious cooking is the Employer's personal preference and not a normal job requirement listed in the DOT. The Employer was clearly notified that in order to rebut the NOF it had to show that the ethnic cooking requirement bears a reasonable relationship to the occupation and is essential to perform the job duties as described by the Employer, and the job as currently described existed before the Employer filed the application for certification. If the job did not exist before, the Employer must document that a major change in its household operation caused the job to be created prior to filing the application. In the alternative, the CO gave the Employer the option to amend the certification application by deleting the specialized ethnic/religious experience requirement.

On April 30, 2003, the Employer filed a rebuttal to the NOF asserting that the requirement of experience in kosher-style cooking is an essential business necessity because the Employer has kept a kosher home all of her life and the experience is necessary to maintain her customs and beliefs. (AF 37-41). The Employer stated that "[a]n applicant with two years cooking experience could not "readily adapt" to a kosher style of cooking." The Employer further asserts that a severe back injury she has had for five years constitutes a major change in her household operation. The back injury is the

alleged reason why the Employer is unable to "stand watch over" and instruct an applicant who does not have two years of experience in kosher-style cooking. The Employer alleges her husband's demanding work schedule prevents him from providing any training.

On May 16, 2003, the CO issued a Final Determination ("FD") denying certification on the ground that the Employer failed to document a business necessity for the requirement that an applicant have two years of experience in the job offered. (AF 42-43). The CO reiterated that requiring an applicant to have experience in a religious food specialty is the Employer's personal preference and not a normal job requirement. The CO concluded by stating that the "Employer did not submit documentation to show why the [E]mployer … is unable to provide training or instruction" to an applicant with two years of general cooking experience.

On June 24, 2003, the Employer filed a Request for Review[3] and the matter was docketed in this Office on September 30, 2003. The Employer's Request for Review argued that the restrictive experience requirement should be permitted as she has adequately documented a business necessity. (AF 53-55).

DISCUSSION

According to 20 C.F.R. § 656.21(b)(2)(i)(A, B, C):

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

> (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
>
> > (A) Shall be those normally required for the job in the United States;

[3] The Employer's last day to a file a Request for Review is thirty-five days from the date of the FD, which the Employer concedes was June 20, 2003. (AF 54). The Employer's Request for Review is dated June 19, 2003, specifies a "reply date" of June 21, 2003, but was not received until June 24, 2003. The Appeal File does not contain any documentation regarding the actual date of mailing. Since the denial of certification is being affirmed on the merits in this case, it will be presumed that the Request for Review was timely filed.

(B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;

(C) Shall not include requirements for a language other than English.

The three requirements of 20 C.F.R. § 656.21(b)(2)(i) are conjunctive. *Lucky Horse Fashion, Inc.*, 1998-INA-182 (Aug. 22, 2000) (*en banc*). If all three of these requirements are not met, the minimum job requirements specified by the employer on the ETA 750A are per se unduly restrictive. *Id.* This squarely places the burden on the employer to show business necessity.

All cooking specialization requirements for domestic cooks are unduly restrictive under 20 C.F.R. § 656.21(b)(2), and therefore must be justified by business necessity pursuant to *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*). The facts of *Martin Kaplan* are nearly identical to the case at issue here. The employer in that case, Kaplan, required two years of experience in the job offered, which was "Cook-Kosher." Kaplan alleged that his family had traditionally eaten only kosher food and that due to his busy schedule he was unable to train a cook. The CO in *Martin Kaplan* found that Kaplan had failed to document "that someone with two years of experience in domestic cooking could not cook kosher style foods without specialized experience." *Id.* The Employer in this case faces the same obstacle.

The two prong business necessity test requires that the employer demonstrate that the job requirements: (1) bear a reasonable relationship to the occupation in the context of the employer's business; and (2) are essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, supra*. Where the job requirement is for experience in the job offered, prong one of the *Information Industries* business necessity test is always met because it is obvious that there is a reasonable relationship to the employer's same occupation. *National Institute for Petroleum and Energy Research*, 1988-INA-535 (Mar. 17, 1989) (*en banc*). The employer, however, must also establish the essential nature of the requirement. *Id.* An employer who lists experience in the job offered engrafts the job duties. *See*, *e.g.*, *Bel Air Country Club*,

1988-INA-223 (Dec. 23, 1988) (*en banc*); *The Pacific Club*, 1993-INA-25 (Jan. 24, 1994).

The Employer here has failed to provide the requisite information to successfully rebut the NOF and therefore has failed to establish that two years of experience in cooking Jewish kosher dishes is essential to the reasonable performance of the job of a domestic cook. The NOF stated that the Employer's rebuttal must include:

> (a) evidence to support that an applicant with 2 years of cooking experience could not readily adapt to a kosher style of cooking, (b) evidence to show that an applicant with no prior experience in kosher cooking is incapable of preparing kosher food, and (c) document why employer, or anyone in his/her family, is unable to provide training or instruction in the kosher cooking tradition.

The Employer has merely made several self-serving assertions without providing any supporting documentation. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*) provides that "written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." The Employer, for example, asserts a permanent back injury, but fails to provide even a note from her doctor to support this claim. It was rational for the CO in this case to afford such an assertion no evidentiary weight at all. *"Gencorp* does not suggest that where a CO does not request a specific type of document, an employer's undocumented assertion must be accepted and certification granted. To the contrary … a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof." *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

The primary purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to all qualified U.S. workers. *Venture International*, 1987-INA-569 (Jan. 13, 1989) (*en banc*). Unduly restrictive job requirements have an undesirable chilling effect on the number of U.S. applicants. As such, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.